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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 7

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLIAM ALBERT HARBISON

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 12–18) are reported in 26 B.T.A. 896. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 25) is reported in 68 F. (2d) 1004.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 15, 1934 (R. 25). A petition for a writ of certiorari was filed on March 23, 1934,

and was granted April 30, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the taxpayer elects to be taxed under Section 101 (a) of the Revenue Act of 1928, does the basis for computing the 15% deduction allowable for charitable contributions under Section 23 (n) of the Act include capital net gains, or is it limited to ordinary net income only?

STATEMENT

This case involves a deficiency in Federal income tax for the year 1928 in the amount of $930.56. (R. 18.)

The facts as stipulated (R. 11–12) and as found by the Board of Tax Appeals (R. 13–15) may be summarized as follows:

The taxpayer is a resident of White Plains, New York, and during the year 1928 had an "ordinary net income" of $66,634.87, as defined by Section 101 (c) of the Revenue Act of 1928, but without any allowance of a deduction for contributions as provided by Section 23 (n) of the Act.

During the taxable year 1928 the taxpayer had a "capital net gain" of $45,013.52 (R. 6, 17), as defined by Section 101 (c) of the Revenue Act of 1928, and elected to have this capital net gain taxed

under the capital net gain provisions of Section 101 (a) of the Act. (R. 15.)

The total amount of charitable contributions made during the taxable year 1928 by the taxpayer to organizations within the provisions of Section 23 (n) of the Revenue Act of 1928 was $27,996.83. (R. 15.)

The taxpayer claimed as a deduction for charitable contributions in his tax return so filed the sum of $16,747.26, being 15% of the sum of his "ordinary net income" and his "capital net gain."

The Commissioner of Internal Revenue in his amended answer (R. 10) took the position that the contribution deductions should be limited to $9,996.23, or 15% of the "ordinary net income", excluding "capital net gain." The Board of Tax Appeals sustained the Commissioner (R. 17–18) and determined a deficiency of $930.56 (R. 18). The Circuit Court of Appeals for the Second Circuit reversed (R. 24), on the authority of *Bliss* v. *Commissioner,* 68 F. (2d) 890 (C.C.A. 2d). Judge Learned Hand dissented.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In allowing the taxpayer, for the year 1928, to deduct charitable contributions under Section 23 (n) of the Revenue Act of 1928 to the extent of 15% of the sum of his ordinary net income plus his capital net gain.

2. In reversing the Board of Tax Appeals.

ARGUMENT

The issue here presented is identical with that presented in *Helvering* v. *Susan Dwight Bliss,* No. 6, present term. For the reasons set forth in the Government's brief in that case, it is respectfully submitted that the decision below should be reversed.

J. CRAWFORD BRIGGS,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
J. P. JACKSON,
Special Assistants to the Attorney General.

SEPTEMBER 1934.

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